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401991—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 193

PHILIP H. SIMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 33–39) is reported at 119 F. (2d) 679.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 1, 1941 (R. 32, 40), and petition for rehearing was denied May 16, 1941 (R. 52). Petition for a writ of certiorari was filed June 20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether a character witness may be asked on cross-examination (1) if the witness knew "whether or not" the accused "had any previous police or criminal record in the community"; and (2) if he would be surprised to learn that the defendant had been twice previously charged with a crime.

STATEMENT

On May 7, 1940, an indictment in one count was returned against petitioner charging violation of the Harrison Narcotic Act, I. R. C., sec. 2554. On June 17, 1940, a verdict of guilty was returned and on the following day petitioner was sentenced to imprisonment for eighteen months (R. 8).

It is undisputed that petitioner delivered a quantity of morphine to one Mildred McDermott, an addict (R. 24, 26, 27, 29). The case turned upon whether this transaction was a sale to Mrs. McDermott as an addict, as she testified (R. 23–24), or was dispensed to her by petitioner in the regular course of professional treatment, as he contended (R. 28). There were no other witnesses to the transaction.

Petitioner called one Dr. Rubin A. Gerber, a medical expert, to describe the medical nature of trigeminal neuralgia, for which petitioner said he had been treating Mrs. McDermott. Dr. Gerber testified that morphine sulphate in the quantities prescribed and given was not inconsistent with sound medical

practice (R. 30). He was then asked if, from his observation of petitioner, his conduct was that of an ethical physician, and he replied that so far as he knew petitioner had always been "an honest gentleman, a good student, and an ethical practitioner" (R. 11–12).

On cross-examination, Dr. Gerber was asked (R. 12):

> Q. You do not know his reputation for ethical practice in the community in which he lives, do you?
>
> A. In a roundabout way, yes, I had a little opportunity to observe that through a casual consultation I had with Dr. Simon's patients in Passaic.
>
> Q. Do you know whether or not he had any previous police or criminal record in his community?
>
> A. I do not, but I am sure that he has not.
>
> Q. You were sure that he has not?
>
> A. No, I would not say that, but I am sure that he is not the type that would have.
>
> Q. Doctor, would you be surprised to learn that he was charged in 1933 with the crime of conspiracy, and that he was charged in 1934 with having performed an abortion?

Petitioner objected to this last question (R. 12), and the objection was sustained (R. 14). The witness was then asked (R. 15):

> Q. Doctor, do you know the defendant's general reputation for ethics in the community in which he lives and practices?
>
> A. I do not.

The Circuit Court of Appeals held that the questions were proper and affirmed the judgment of conviction.

ARGUMENT

1. Petitioner admits, *arguendo*,[1] that Dr. Gerber was a character witness (Pet. 14), but nevertheless contends that the prosecutor was guilty of "highly prejudicial" misconduct in asking the witness if he knew "whether or not he [the defendant] had any previous police or criminal record in his community" (R. 12). Petitioner's argument is directed chiefly to the form of the question as assuming the existence of a previous police or criminal record (Pet. 15). However, the question carries no clear inference of the existence of such a record. The witness was simply asked "Do you know *whether or not* he had any previous police or criminal record?" Plainly the form of the question is not, as petitioner contends, grammatically equivalent to "Do you know that?" and certainly is much less objectionable than to have asked him "Have you heard?" of specific acts

[1] There was some dispute below as to whether Dr. Gerber was a character witness. The Circuit Court of Appeals held that while he was not originally called and qualified as a character witness, petitioner nevertheless "chose to put his conduct as a physician in evidence" and thus opened the door to further inquiry into his reputation (R. 37). Petitioner does not challenge this ruling and predicates his entire argument on the theory that Dr. Gerber was a character witness.

of misconduct, which petitioner concedes to be proper (Pet. 15). See *Stewart* v. *United States*, 104 F. (2d) 234, 235 (App. D. C. 1939).[2] The reference is merely to "a police or criminal record," and escapes violation of the "rule against particular facts," which is the danger to be guarded against when testing the grounds of the witness's knowledge of the accused's reputation. III Wigmore, Evidence, 3rd ed., § 988.

2. Petitioner also predicates error upon the question asked of Dr. Gerber: "Doctor, would you be surprised to learn that he [the defendant] was charged in 1933 with the crime of conspiracy, and that he was charged in 1934 with having performed an abortion?" (R. 12). Petitioner contends that the mere asking of the question was so prejudicial that the court should have *sua sponte* declared a mistrial. The Circuit Court of Appeals rejected this contention by holding that the question was proper, and that it was not, in any event, prejudicial (R. 38–39).[3]

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[2] The cases cited by petitioner (Pet. 16) are therefore distinguishable since in each instance where a question was condemned as prejudicial to the accused there was an unmistakable inference which was inimical to his reputation.

[3] Petitioner presents an elaborate argument concerning the power of the appellate court to review the alleged error of the trial court despite his failure to move for a mistrial (Pet. 19–22). The opinion is clear, however, that the court below did not refuse to pass upon the propriety of the questions alleged to have been improper, but on the contrary, addressed itself entirely to the merits of the substantive

Petitioner asserts (Pet. 17) that the purpose of this question was not to impeach the witness, but to show in an indirect way that the defendant was previously charged with the crimes of conspiracy and abortion. We think it more probable, however, that the real purpose of this question was the entirely legitimate one of testing the basis of the witness' claimed knowledge of the reputation of the accused. If he were surprised to learn of such charges it might have reflected upon his knowledge of the defendant's reputation; and if he were not surprised, the jury might reasonably have doubted the honesty of his testimony. See III Wigmore, Evidence, 3rd ed., § 988, p. 618. Questions no less prejudicial to the accused have frequently been held to be proper.[4]

The cases cited by petitioner which deal with the propriety of interrogating a character witness as to the extent of his knowledge of the accused's reputation (Pet. 16, 18–19) present no conflict with

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problem in the case. The court's reference to petitioner's failure to pursue his objection is simply recited as evidence to show lack of substantial prejudice (R. 38–39).

[4] *United States* v. *Commerford*, 64 F. (2d) 28, 31–32 (C. C. A. 2d, 1933), certiorari denied 289 U. S. 759; *People* v. *Buchanan*, 119 Cal. App. 523, 525–528 (1932); *People* v. *Tedesco*, 1 Cal. (2d) 211 (1934); *State* v. *Shull*, 131 Ore. 224, 227–231. See also, *Reuben* v. *United States*, 86 F. (2d) 464, 467–468 (C. C. A. 7th, 1936), certiorari denied 300 U. S. 671; *Jung Quey* v. *United States*, 222 Fed. 766, 771 (C. C. A. 9th, 1915). Cf. *Chiccarello* v. *United States*, 68 F. (2d) 315 (C. C. A. 3rd, 1933); *Lisansky* v. *United States*, 31 F. (2d) 846, 851 (C. C. A. 4th, 1929), certiorari denied 279 U. S. 873.

the opinion below.[5] Each turns upon the somewhat elusive point whether the questions are directed to the end of showing the existence of prior charges against the defendant, or whether they are designed to test the character witness' knowledge of those charges as bearing upon the defendant's general reputation. See the elaborate discussion in *Spalitto* v. *United States,* 39 F. (2d) 782, 785–787 (C. C. A. 8th). Of necessity the question must turn upon the circumstances of each case. Here, the prosecutor's question was quite evidently designed to probe the extent of the witness' knowledge of the defendant's reputation. The court below found that "There is nothing in the record to indicate that the United States Attorney asked the question maliciously or in bad faith" (R. 38), and petitioner does not point to anything which shows the contrary.

3. In any event, it seems clear enough that petitioner could not have been substantially prejudiced by the questions asked of Dr. Gerber. Petitioner made no objection whatever to the first question (R. 12). And, as the court below pointed out (R. 39), the trial judge not only sustained petitioner's objection to the second question but also expressly instructed the jury to be guided only by the testimony (R. 13). Counsel for petitioner apparently

[5] Other cases cited by petitioner (Pet. 18–19) concern the impeachment of a witness by interrogating him as to his past criminal record, which, of course, is an entirely different problem. III Wigmore, Evidence, 3rd ed. § 980a.

was content, and asked neither for a mistrial nor for more specific instructions. Cf. *Little* v. *United States,* 93 F. (2d) 401, 408 (C. C. A. 8th, 1937), certiorari denied 303 U. S. 644; *People* v. *Gordan,* 103 Cal. 568, 575 (1894); *Taylor* v. *Commonwealth,* 269 Ky. 656, 662–663 (1937).

CONCLUSION

The petition for writ of certiorari presents no questions of importance nor is there any conflict of decisions. Therefore, we respectfully submit that it should be denied.

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